Supreme Court, U.S.
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No. 92-1789

In The

Supreme Court of the United States

October Term 1992

EMPLOYERS INSURANCE OF WAUSAU, etc., et al.,

Petitioners,

versus

OCCIDENTAL PETROLEUM CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Petitioners have presented four separate questions for review (Petition at i). For the reasons indicated in this opposition brief, Respondents submit the following as a single, fair and accurate restatement of the question presented for review:

> Whether marine insurers which issued a time hull policy on a vessel may recover the payment which they made under the policy for loss of the vessel because it was subsequently found (after trial) to be unseaworthy at inception of the risk, when the policy expressly covered the "negligence . . . of any person . . . provided such loss . . . has not resulted from want of due diligence" on the part of the assured/owner (as was also found).[1]

Subsumed in this restated question are the first three of Petitioners' questions. Petitioners' fourth question is a procedural point which Respondents demonstrate herein (Pt. 4, page 8) is not even appropriately raised.

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[1] *Cf.*, the question for decision as narrowly framed in the opinion below (Pet. App. at 43):

> Does the Liner Negligence Clause [in the time hull policy issued to Occidental], at least with respect to pre-attachment negligence or error in judgment by parties involved in the construction of the vessel, effectively supplant or waive the absolute implied warranty of seaworthiness at the inception of a time hull policy? (Bracketed material added.)

STATEMENT REQUIRED BY RULE 29.1

This Brief in Opposition to Petition for Certiorari is filed on behalf of

1 – Occidental Petroleum Corporation ("OPC") and the following corporations which are direct or indirect wholly-owned subsidiaries of OPC:

2 – Occidental Chemical Corporation (by merger into it of Occidental Chemical Agricultural Products, Inc., which itself was a direct or indirect wholly-owned subsidiary of OPC);

3 – Suwannee River Chartering, Inc.; and

4 – Suwannee River SPA Lines, Inc.

Neither OPC nor any of its subsidiaries hereinabove identified has parents or subsidiaries which are other than wholly-owned, directly or indirectly, except that OPC, directly or indirectly, holds less than full ownership in:

Canadian Occidental Petroleum, Ltd.
Carbocioro S.A.Industries Quimicas
Citco Union Texas Petroleo do Brasil, Ltda.
Diamond Shamrock Chemicals Company Pty. Limited
Occidental Petroleum (South America), Inc.
OXYTECH Systems, Inc.
Repsol Occidental Corporation
Sumidurez Singapore Pte. Ltd.
Thai Diamond Shamrock Ltd.
Thai Occidental Chemical Ltd.
Trans-Jeff Chemical Corporation
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REPORTS OF OPINIONS DELIVERED BELOW

The opinion of the Court of Appeals is reported as *Employers Insurance of Wausau v. Occidental Petroleum Corporation*, 978 F.2d 1422, 1993 A.M.C. 1460 (5th Cir. 1992).[2] The opinion of the District Court is reported only as *Employers Insurance of Wausau, Inc. v. Avondale Shipyards, Inc.*, 1992 A.M.C. 477 (E.D. La. 1991).

STATEMENT OF THE CASE

This particular facet of the extensive litigation spawned from the sinking of the OXY PRODUCER ITB, in 1981, involves a cross-claim filed by certain American insurers ("Underwriters" or "Petitioners") against Occidental Petroleum Corporation and allied interests ("Occidental" or "Respondents"), which for all practical purposes was the vessel owner and the assured under the policy, to recover the payment which they had made under the insurance policy issued to Occidental for a portion of the loss.

Having been for the most part frustrated in their subsequent efforts, as subrogees of their assured, to recover the loss from the shipbuilder and construction supervisor who alone were found responsible for the

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[2] The opinion of the Court of Appeals is reproduced in the Appendix to the Petition for Certiorari filed herein. Citations to that opinion in this brief will be designated as "Pet. App. at ___."

vessel's unseaworthy condition, the Underwriters eventually sought recoupment from Occidental. They proceeded on the grounds that their insurance policy never took effect because the vessel was in fact unseaworthy when the risk attached and that this condition constituted a breach of an implied warranty of seaworthiness asserted to be an "absolute" condition of the insurance policy.[3]

Although Respondents for the most part accept the strictly factual portion of Petitioners' statement of the case (Petition at 2-7), they believe it appropriate to correct certain misleading characterizations regarding awareness of the unseaworthy condition which caused the loss. Thus, Petitioners state that the improper mating of the ITB components "was apparent and had actually been discovered . . . prior to the release of the ITB from the shipyard" (Petition at 5); and that the unseaworthy condition was "open, obvious *and discovered* (*Id.*. at 18), and

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[3] The Underwriters' initial (subrogated) action for recovery of the loss, against the shipbuilder and others, was itself premised on unseaworthiness of the vessel upon its delivery to Occidental. Occidental mainly joined in that action, not for recovery of the vessel's loss, since Occidental had been paid, but for incidental expenses associated with alteration of the interconnection system of the vessel's two sister ships, to comply with classification and government regulations. See *Employers Ins. of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, 755-57 (5th Cir.), *cert. den.*, 493 U.S. 820, 110 S. Ct. 77, 107 L. Ed. 2d 43 (1989). The Underwriters' subrogated recovery claim was found for the most part to be foreclosed by this Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). See *Employers Ins., supra*, 866 F.2d at 758 et seq.

resulted from "known *deviations* from crucial construction specifications" (*Id.* at 19).

But as Petitioners themselves elsewhere acknowledge: "It was not determined until the conclusion of the [subrogated] recovery action against the parties involved with the construction of the vessel" [*Employers Ins. of Wausau v. Suwannee River SPA Lines, Inc.*, 866 F.2d 752, 1990 A.M.C. 447 (5th Cir. 1989)] that the unseaworthiness was present upon delivery of the vessel. (Petition at 4; bracketed material added.)

The undisputed facts (as reiterated in the decision of which review is now being sought), are that the loss of the vessel was not caused by any lack of due diligence on the part of Occidental, the assured/owner, nor by any lack of due diligence on the part of the manager of the vessel. Pet. App. at 46-47. Instead, it was determined (after trial of the subrogation lawsuit) that the actions of the shipbuilder and construction supervisor were the sole cause of the loss.

Following a thorough exposition of the litigation's lengthy history, and analysis of the interplay between (a) an implied warranty of seaworthiness that might otherwise apply at inception of the insurance risk and (b) the specific provisions of the insurance policy issued to Occidental, the Fifth Circuit's decision (Judge King) concluded:

> In sum, we hold that the district court correctly granted summary judgment in favor of Occidental on the basis of the Liner Negligence Clause. The plain language of that clause effectively underwrites the unseaworthiness that caused the sinking of the OXY PRODUCER. In

> essence, it covers loss caused by the negligence of any person other than the insured, the owner, or the manager of the vessel. For purposes of this case, it is broad enough to cover the negligence of Hvide as the construction supervisor and the negligence of Avondale as the ship builder. At least to this extent, then, the Liner Negligence Clause waives or displaces the absolute warranty of seaworthiness implied at the inception of a time policy.

Pet. App. at 47.

REASONS FOR DENYING THE WRIT

1. The Question is of Limited Importance and the Decision Below Has Only Minimal Precedential Value.

Although claiming the ruling below will "wreak havoc with established marine insurance law" (Petition at 9), Petitioners fail to explain how such result follows from a narrow decision dealing with specific provisions in a marine insurance policy prepared by Petitioners and issued to Respondents. There certainly is no apparent decisional conflict among the lower courts on the narrow question presented here. Moreover, Petitioners otherwise fail to show why the question is of such importance as to warrant review by this Court. Indeed, despite the passage of some six months since publication of the decision below (and more than a year since publication of the

district court's decision in *American Maritime Cases*),[4] so far as undersigned counsel is aware it has not yet brought forth a single person or interest requesting *amicus curiae* status in support of the instant petition for certiorari. Nor have Petitioners been able to cite any evidence of concern over the decision other than that of the immediate parties involved.[5]

2. Both the Question Presented, and the Decision Below, Turn on Their Own Specific Facts.

The time hull policy issued to Occidental contained a Liner Negligence Clause, a species of "all risks" coverage according to one commentator (Pet. App. at 42), which greatly expands the coverage traditionally provided in marine hull policies, to include the "negligence . . . of any person", with the only qualification being that the loss "has not resulted from want of due diligence by the Assured. . . . "[6] And, as held in the decision below, the

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[4] In addition to publication in the official reports, the decision of the Fifth Circuit was also reported in *American Maritime Cases*, 1993 A.M.C. 1460.

[5] There is even considerable doubt, in light of this Court's decision in *Wilburn Boat Co. v Fireman's Fund Ins. Co.*, 348 U.S. 310, 319-21, 75 S. Ct. 368, 373-74, 99 L. Ed. 337 (1955), that a substantial federal admiralty question is presented. *See* the decision below, Pet. App. at 22-23, 44; Gilmore and Black, *The Law of Admiralty* (2d ed. 1975) at 68-69.

[6] The development and effect of the Liner Negligence Clause in marine hull policies, typically as a substitute for the arcane and litigation-fraught Inchmaree Clause, is well documented. *See*, generally, Tetreault, *The Hull Policy: The Inchmaree Clause*, 41 Tul. L. Rev. 325, 325-46 (1967); Alex L. Parks, *The Law*

"due diligence" requirement on the part of the assured operates as a waiver of, or displaces, the otherwise implied warranty of seaworthiness at inception of the risk. Pet. App. at 47.

The decision below is expressly limited to a "careful reading of the Liner Negligence Clause in the policy issued to Occidental," and the "plain language" of that clause which was held to be "unambiguous". Pet. App. at 45-47.[7] Such "standardized" marine insurance clauses as the Liner Negligence Clause (and its precursor, the Inchmaree Clause) are not written in stone; they are often modified or even superseded entirely.[8] Consequently, despite the Petitioners' expressed fears (Petition at 9), it can be expected that the marine insurance industry remains quite capable of tailoring its policies to accomplish its objectives.

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and Practice of Marine Insurance and Average (1st ed. 1987), at 406; Leslie J. Buglass, *Marine Insurance and General Average in the United States* (2d ed. 1981) at 139.

[7] These provisions, the court below held, unlike the negligence provisions in the Inchmaree Clause, are not limited to "operational negligence" but are "worded broadly enough to include the negligence of shipbuilders and the construction manager." Pet. App. at 46.

[8] Tetreault, *supra*, 41 Tul. L. Rev. at 334-35. Indeed, although the text of the Liner Negligence Clause is reproduced in Pet. App. at 70, the endorsement by which that clause was added to Occidental's policy recites that it replaces the "ADDITIONAL PERILS (INCHMAREE) clause of the attached Policy . . . ".

3. In Deciding the Question at Issue, One of First Impression, the Fifth Circuit Adhered to Settled Principles in Reaching the Correct Result on the Particular Facts

After framing the narrow question for decision the court below observed that "although it has received some attention from commentators, has not yet been squarely addressed by any court." Pet. App. at 43-44. It then proceeded "with caution."

The Court of Appeals first agreed with Petitioners' argument below that the implied warranty of seaworthiness at inception of the risk in a time policy, as in a voyage policy at inception of the voyage, is "absolute in nature, requiring neither knowledge nor fault on the part of the assured" (Pet. App. at 37-38; 27-39). It then proceeded to note the broader coverage provided under the Liner Negligence Clause (as compared to the Inchmaree Clause). Then, on the basis of its own precedent, *Tropical Marine Products, Inc. v. Birmingham Fire Ins. Co. of Pennsylvania*, 247 F.2d 116 (5th Cir.), *cert. den.*, 355 U.S. 903, 78 S. Ct. 331, 2 L. Ed. 2d 260 (1957), it determined to "look to the language" of the Liner Negligence Clause "to see if it unambiguously covers risks which would ordinarily be excluded by a breach of the implied warranty of seaworthiness." Pet. App. at 45.

Only after a "careful reading of the Liner Negligence Clause in the policy issued to Occidental" (Pet. App. at 45), and the "undisputed facts" (from the Underwriters' prior subrogation action against the shipbuilder and others) "that the loss of the Oxy Producer was not caused

by any lack of due diligence on the part of Occidental . . . nor . . . on the part of Hvide as manager of the vessel" (Pet. App. at 46-47), did the appellate court conclude that the district court correctly granted summary judgment in Occidental's favor "on the basis of the Liner Negligence Clause." Pet. App. at 47.

It is accordingly clear that the decision below, turning on its own special facts, does no violence whatever to (a) the decision of this Court in *The Caledonia*, 157 U.S. 124, 125, 15 S. Ct. 537, 541, 39 L. Ed. 644 (1895) (upholding the absolute nature of the implied warranty) or (b) the Fifth Circuit and other lower court decisions cited by Petitioners (Petition at 10-12). *None of those decisions involved a Liner Negligence Clause*, and Petitioners' efforts to equate such clause with an Inchmaree Clause (Petition at 14-16, 20) are unavailing.[9] Far from demonstrating any decisional conflict on the narrow question presented, the Underwriters are reduced to suggesting that the case should be remanded for the taking of additional evidence (Petition at 9, 22-23).

4. That the Decision Below is Based on a Summary Judgment Record is of No Consequence

Underwriters, complaining that the decision below is predicated on a summary judgment record (Petition at 9, 14), argue that factual issues should be developed, such as whatever other mechanisms might have been available for waiving what they contend (and the decision below

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[9] See note 8, supra, page 6.

held) to be an "absolute" implied warranty of seaworthiness at inception of a time policy (Pet. at 22-23). This assertion is not only contrary to Underwriters' earlier position,[10] but evinces a misunderstanding of the Fifth Circuit's decision to base its holding upon the interpretation of a particular provision in the specific policy of insurance issued to Occidental. Pet. App. at 43-47. This was a legal – not a factual – question. It is immaterial that there might be other mechanisms, within or apart from the insurance policy, for achieving the same result that was given by the "clear and unambiguous" language of that policy. Pet. App. at 45.[11]

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[10] Underwriters themselves had previously claimed there were no unresolved, pertinent factual issues. They also moved for summary judgment in the district court on the basis that there were no undisputed material facts; and both sides fully briefed, in the lower courts, the legal issues presented by the Liner Negligence Clause. Underwriters did not then suggest that there was an insufficient record for the courts to rule upon the legal effect of the provisions of the Liner Negligence Clause vis à vis whatever implied warranty of seaworthiness might otherwise be held to apply at inception of the risk.

[11] Contrary to Underwriters' assertion (Petition at 14), nowhere in the decision below did the court indicate an "unfounded belief" that the Liner Negligence "constituted the only basis" by which the implied warranty of seaworthiness at inception of the risk could be disclaimed in the policy. The court simply rejected Underwriters' view that a breach of the implied warranty of seaworthiness at inception of the policy precludes recovery "despite the presence of a clause in the policy expanding coverage", the court deciding instead to give effect to the specific language of the Liner Negligence Clause as effectively supplanting the implied warranty that otherwise might apply. Pet. App. at 43, 45-47.

5. Respondents' Other Arguments Support the Judgment Below.

Entirely apart from the particular provisions of the hull insurance policy which were held to preclude the Underwriters' recovery from their assured, Respondents offered below two additional discrete bases for defeating the Underwriters' cross-claim:

> (a) the parties' Standstill Agreement, which barred any action by the Underwriters against their assured except in one specified event only, which did not occur (Pet. App. at 14-25); and
>
> (b) the various actions of the Underwriters by which they should be held to have waived, or be estopped from asserting, their cross-claim (Pet. App. at 49).

Although the court below held that neither of these separate and distinct issues could be decided on a summary judgment record (Pet. App. at 25, 49), either one could be dispositive of Underwriters' claim on the basis of a full trial record. Accordingly, even a reversal of the decision below on the narrow question presented here would not end the controversy.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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